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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re:	)	
Amendment of Part 1 of the	)	WT Docket No. 97-82
Commission's Rules --	)	
Competitive Bidding Proceeding	)	

REPLY COMMENTS OF NARROWBAND PCS COMPANIES

The law firm of John D. Pellegrin, on behalf of several Narrowband PCS entities/clients, respectfully submits the following Reply Comments as invited by the Commission in the above-captioned docketed proceeding.[1] We note over 20 parties have participated so far by filing initial Comments in response to this NPRM. Most all echo the suggestions and concerns advanced herein.

To its credit, the Commission has refined its auction procedures and seeks to continue to do so in this particular proceeding, looking towards a more efficient and less time consuming process. However, the Commission should be careful in its zeal to streamline the

[1] This firm has participated in previous FCC rulemaking proceedings on behalf of would-be Narrowband PCS applicants/clients, including PP Docket No. 93-253, GN Docket No. 90-314, and GN Docket No. 93-252. The thrust of submitted Comments/Reply Comments is that the both Congress and the FCC have recognized the importance of the "Designated Entity" concept and should maintain its viability by continuing to make available and equalizing installment payment plans and bidding credits for smaller entities.

auction/licensing process and avoid defaults, that it does not create unintended situations and consequences which redound to the detriment of the very program both Congress and the Commission have established to promote the full participation of many different companies and would-be service providers.

These Reply Comments will be fairly limited and focused on concerns which second and third tier or smaller companies have with the proposed policies and structure which the Commission is exploring in this particular proceeding. Smaller companies have formed and continue to form in anticipation of the long-awaited Narrowband PCS auctions. Since the Commission first announced its allocation of additional spectrum and opportunities for new enhanced paging services such as Narrowband PCS, entrepreneurs have sought to position themselves to participate in this next generation of advanced communications, continually encouraged by both Congress's mandate and the Commission's stated commitments towards assuring them a fair chance at providing such services in auctions. These commitments center around the Commission establishing the "designated entity" ("DE") classification to assure that while huge, multi-million dollar companies have an ability to acquire licenses, those same companies do not have the ability to prevent smaller companies from acquiring some allocated frequencies. Congress and the Commission both realize that many innovations and niche market and service breakthroughs/enhancements have been made by pioneering, smaller companies. It is important for the Commission to carry out Congress' clear legislative intent in preserving the opportunity for relatively smaller companies to compete for licenses in a fair manner.

With the above preamble, we comment on specific sections of the Commission's NPRM:

Definition of Gross Revenues and Attribution of Gross Revenues of Investors and

Affiliates. Commencing at para. 22 of the NPRM the Commission discusses "gross revenues" and how such should be determined. For new, start-up applicants/entities, the issue of "gross revenues" should not be a problem, since they will not have had much of a track record, if any, and should be able to take advantage of the Commission's most expansive terms (both installment payments and bidding credits). This is to be encouraged in diversifying ownership and bringing competition to the marketplace. Where entrepreneurs choose to form in either a limited liability company, general partnership format, or consortium thereof, there is no question but the aggregate of the **bidding entity**, or **bidding consortium** as currently permitted by the Commission, should be the bellwether test for determining "gross revenue" and what that entity is entitled to under Commission Rules and policies.

The Commission should not have to look to individual partners in a general partnership applicant, nor individual members in an LLC, nor individuals who hold their equity interests in entities which in turn are members of a bidding consortium to determine "gross revenues." Only where an individual partner or member of an LLC can exercise either de facto or de jure control (as the Commission notes in para. 28 of the NPRM) should this issue have to be addressed. As the Commission points out, this comports with prior FCC interpretation as to control and attribution criteria.[2] Thus, we fully support the Commission's proposal to use for "gross

[2] In the general partnership applicant context, while each partner has the right to an equal say in the partnership's affairs, invariably that individual only has voting privileges commensurate with his/her number of partnership units. Thus, where there are 50 to 100 partnership units in a general partnership, an individual with less than 15-25% ownership could not be in either de facto nor de jure control, no matter what that particular partner's individual average "gross revenues" were for the last three years. This lack of control and non-attribution by any partner in a **general** partnership and the way in which the Commission should view this was previously raised in our Reply Comments filed under date of February 2, 1995 in PP Docket No. 93-253. Therein, the Commission was urged to adopt a minimum 15% equity participation

revenues" calculation **[and where any other attribution issue arises]** only "controlling principals of the applicants and their affiliates, with the term 'control' including both de jure and de facto control of the applicant." (NPRM at para. 28) Of course, no applicant would object to **full** disclosure of ownership interests in the bidding entity and/or bidding consortium and how that entity/consortium is structured.

The Commission should not saddle such start-up entities by requiring **audited** financial statements initially, audits which are relatively expensive.

Installment Payments and Bidding Credits. Probably the most important item in the Commission's NPRM is its discussion of installment payments and whether to modify Section 1.2110(e) of the Rules. As other parties commenting in this proceeding have noted, the linchpin to an overall strategy by any company is the initial cost of acquisition of the license through auction, the payout terms, and the capital costs of construction and implementation. This the Commission recognizes as being **critical** to DEs' ability to structure their successful bidding and entry into the market to provide competition in and additional communications services (NPRM at paras. 32 and 34). The FCC must continue to take this into consideration as one of the salient principles of any auction matrix. Any negative movement or time compression in the initial acquisition cost (including the installment payment plan which the Commission has consistently and correctly embraced since the beginning of the small business DE program), would have potentially disastrous consequences to any entity which has built its business plan and license acquisition strategy on timed payouts. There is no doubt that any increased cost to the conditional licensee would increase the cost of capital and make the proposed venture that much

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standard for attribution and control group purposes. The same seems appropriate here.

more difficult to finance in a cost-effective manner -- if at all.

The proposal (NPRM at para. 34) to simply increase **bidding credits** and either eliminate or substantially curtail **installment payments** will not have the desired effect of continuing the support and encouragement of a multiplicity of bidders and ultimate competitive communications service providers. A review of previous auctions and the use of bidding credits will clearly show that for those licenses which were set aside as eligible for bidding credits, winning bids virtually eliminated any such "advantage" since the bids were some 25-40% higher on average than for similar, non-bidding credit licenses. Supposedly, this might be somewhat attributed to "bidders' folly," but the reality is that installment payments are the most critical part of this equation. We are not advocating that no bidding credits be allowed -- indeed, we endorse the Commission's concept of pegging the credits in inverse proportion to the gross revenues of the applicant; i.e., the lower the gross revenues attributable to the applicant, the higher the bidding credit available (10-15-25%). The Commission in any event must maintain the installment payment plan in at least its current form, if not a more expansive version for the FCC itself acknowledges that "installment payment plans have been a useful tool for small businesses to access capital" (NPRM at para. 34). This remains true.

Nor do we think that requiring larger down payments, such as 30-40% vs. the current 10-20% (NPRM at para. 35) is appropriate. An applicant who has placed tens or hundreds of thousands of dollars down in the form of upfront/down payments is not about to walk away from these deposited funds on a whim. By keeping the downpayment at the current level, this would allow bidders to target a reasonable number of alternate markets in which to participate. Nor does it appear to be a good idea to require increases in upfront payments **during** the course of

an auction, as an alternative put forth at para. 35 of the NPRM. The Commission has the inherent ability -- which it has routinely exercised -- to re-auction licenses on which a non-cured default has occurred. This seems more than adequate to assure that timed payments will be made. Remember, the successful bidding applicant will need substantial resources and access to capital to build out and establish revenue service to meet these installment payment requirements to saddle bidders with higher up-front costs is counterproductive.

Setting a uniform or more uniform schedule of payments for DEs in various upcoming auctions, as suggested by the Commission at para. 35, seems appropriate. Also, setting the interest rate at the **beginning** of the auction vs. currently after the close of the auction (NPRM, at para. 38) may well be conducive to establishing for applicants a more definite cost factor which they can take into consideration in their bidding strategies.

While no one can legitimately quarrel with the Commission insisting on security for the installment payments of auction bids, the Commission must recognize these requirements will undoubtedly increase the cost of capital because any lender will want to be in as preferred a position as possible. The lower the preference, the more risk assumed by the lender and the higher the cost of capital. This is a plain economic/money market fact. Therefore, the Commission, in justifiably requiring security agreements and promissory notes, should not then also accelerate repayment schedules to be any less than that of the basic license term itself (10 years), nor raise interest rates, nor allow interest-only payments for a lesser period of time than is presently set forth in the Rules.

As to interest-only payments themselves, serious consideration should be given to extending that period with possible later-staged principal repayments. Alternatively, a single

balloon payment toward or at the end of the license term (or upon transfer of control of the license) if not acquired by a similar applicant in terms of size, should be considered. This is appropriate as licensees will need significant time to build out their facilities and generate sufficient revenues to cover all the various costs.

The Commission should also consider that its ultimate control over this situation rests with rules and policies already in existence; i.e., if a winning bidder/licensee defaults on its repayment, the Commission **automatically** may cancel the license, keep whatever payments have been made to date, and exact a further penalty if and when it re-auctions such license. This sanction effectively gives the Commission a first-priority as a creditor, for without the license to operate, any infrastructure is virtually worthless. Knowing that, no licensee would allow itself to default without first trying everything commercially feasible internally and in the private market to rectify the situation.

Late Payments, Grace Periods, and Defaults. Commencing at para. 69 of the NPRM, the Commission asks about possible modifications to its current policies as to payments by winning bidders. The Commission has recently experienced a few defaults in other auctioned services. This is probably to be expected, what with the vagaries of the lending market place and need to secure second and third tier financing to build-out or expand on a basic system(s). Some companies may have become over-leveraged and secured more licenses than they could eventually finance in the time frame the Commission or they reasonably expect. The Commission should continue to allow a grace period to rectify any default, while assessing a late fee to encourage licensees to make their payments timely. The Commission should also consider adopting its companion concept of moving to an annual vs. quarterly installment payment plan

because of the demonstrated vagaries of the financial marketplace, timing of financial requests, and lead time needed to secure financing, even internally, Annual payments would also cut down on the administrative burden for the Commission or any government agency, as well as the licensees. Since a license will automatically cancel if a default has become final, the Commission has an existing, adequate remedy to ensure conscientious attention to prompt and timely payments. Some flexibility in the system should continue, to allow a licensee the chance to retrench if need be because of the vagaries of the market, inability to secure necessary equipment and other possible delays in getting into and expanding revenue service.

Even the federal government has come close to being in default on its interest payments from time to time. But for an Act of Congress or additional appropriations, such could happen. Hence, the Commission should remain sympathetic to a licensee who demonstrates a real problem with making a particular payment. For this reason, the Commission should not adopt any **cross default** policy as suggested in paras. 76-78 of the NPRM. If a licensee has to retrench, it should not see all its licenses won at auction be cancelled because of an inability to meet a payment on a particular license whose market may be much more difficult to generate sufficient revenues within the payment time frame. Each license should stand on its own in terms of payment requirements. If there is a default which has not been cured, then the Commission's proposed quarterly auction concept could easily handle that possibility and the Commission and the integrity of its process is fully protected.

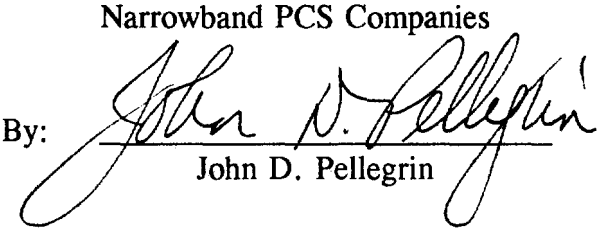
Auction Mechanics. The Commission has set out for comment various issues involving the auction process itself, starting at para. 79 of the NPRM. Without responding in detail, we would point out that an acceleration of the auction process itself is a desirable goal (currently

some auctions last 3 to 4 to 6 months or more). Bidders must have sufficient time to assess their strategies between rounds, of course, so compression of any given auction may be problematical. The Commission may wish to consider some form of **exclusion** or loss of eligibility through loss of bidding activity for particular markets; i.e., if an entity has not bid in a particular market for at least X number of rounds (say, 20), then perhaps it should be excluded from any further bidding for that market in that auction. This would cut down on incidents of entities who are not sincere bidders vis-a-vis a particular market and are merely parking activity/preserving eligibility in an attempt to game the auction unfairly, to the detriment of sincere bidders for that market.

Back-up or alternative methods of participation in an auction are important. Thus, going solely to an electronic bidding format is potentially troublesome, as bidders and the Commission have experienced electronic bidding errors which have become very costly to all concerned. The Commission also continues to experience software and computer-related problems. The alternative of allowing telephonic bidding should be maintained.

Respectfully submitted,

Narrowband PCS Companies

By: 
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